No. 20427

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOCAL UNION NO. 11, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Appellant,

vs.

G. P. THOMPSON ELECTRIC, INC.,

Appellee.

APPELLANT'S REPLY BRIEF.

BRUNDAGE & HACKLER,
ALBERT BRUNDAGE,
JULIUS REICH,

1621 West Ninth Street,
Los Angeles, Calif. 90015,

Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA 6-9171

TABLE OF AUTHORITIES CITED

No. 20427

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOCAL UNION NO. 11, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Appellant,

vs.

G. P. THOMPSON ELECTRIC, INC.,

Appellee.

APPELLANT'S REPLY BRIEF.

Judging from the Employer's brief, at stake in this case is only a minor procedural problem which turns on whether the reduction-in-litigation policy of Rule 13(a) of the Federal Rules of Civil Procedure is to be furthered or thwarted. In actuality, however, the result of sustaining the decision of the District Court would be to stultify the National policy which requires parties to process grievances through arbitration where they have contractually agreed to do so.

The District Court's decision resulted in a forfeiture by the Union of an admittedly arbitrable grievance, simply because the Union failed to assert its grievance as a counterclaim to an action initiated by the Employer.

Upon the following chain of reasoning rests the Employer's entire case in support of the District Court's decision: parties may waive their right to arbitrate and

may instead submit their disputes to a court for determination; the Union was not required to submit its dispute with the Employer to arbitration; *ergo,* the Union's failure to assert as a counterclaim its arbitrable grievance constituted a waiver of that grievance.

While we agree that the right to arbitrate *may* be waived in favor of litigating a claim, it does not follow that it *must* be waived. Yet it is on this single proposition, namely, that the Union was *required* to waive its arbitrable grievance and present that grievance as a counterclaim in a court action, that the Employer's defense of the District Court's decision rests.

No case has been cited which is on point (none of those cited in the Brief for Appellee involved a counterclaim which consisted of an arbitrable grievance); and indeed, it would be astonishing to find such a case since it would run counter to Supreme Court-enunciated policy of six years' standing. Specifically, in the Supreme Court's arbitration trilogy, *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 4 L.Ed.2d 1424 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.,* 363 U.S. 574, 4 L.Ed.2d 1409 (1960); *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 4 L.Ed.2d 1403 (1960), the lower federal courts were directed to look with favor upon arbitration as a means of settling disputes; and they were admonished to exclude from arbitration only those disputes which the parties expressly agreed should not be arbitrated, *United Steelworkers v. Warrior & Gulf Nav. Co.,* 363 U.S. at 581, 582-83, 4 L.Ed.2d at 1417; see *Desert Coca Cola Bottling Co. v. General Sales Drivers,* 335 F.2d 198, 201 (9th Cir. 1964). The same policy has also been made applicable to the States, *Local 174, Teamsters v. Lucas*

Flour Co., 369 U.S. 95, 102-03, 7 L.Ed.2d 593, 598 (1962).

Since the arbitration trilogy, the Supreme Court has on numerous occasions remanded arbitrable disputes to the parties' grievance adjustment processes where one of the parties sought to have the dispute litigated in court. For example, where an employer sought damages for breach of contract, alleging that the union had actually repudiated the agreement by striking in the face of a no strike pledge and had thus waived its right to demand arbitration, the Supreme Court nevertheless stayed the court proceeding and required the employer to seek its remedy by way of arbitration, *Drake Bakeries, Inc. v. Local 50, American Bakery Workers*, 370 U.S. 254, 260-62, 8 L.Ed.2d 474, 479-80 (1962). The Supreme Court ruled, in *Drake Bakeries*, that the strike action was not "such a breach or repudiation of the arbitration clause by the union that the company is excused from arbitrating, upon theories of waiver, estoppel, or otherwise," *id.*, 370 U.S. at 262, 8 L.Ed.2d at 480.

Yet the Employer in this case would find a waiver from the fact that the Union *could*, if it wished, have waived its right to arbitrate.

Were the District Court's decision sustained, it would create a novel exception to the National policy which states that a party desiring to arbitrate an arbitrable dispute is entitled to utilize that forum and need not have his grievance adjudicated by a court.[1]

---

[1]The Union bargained to have an arbitration board decide "all matters concerning questions, interpretations, disputes or violations of this Collective Bargaining Agreement," Article I, §5(a) of the parties' agreement [R. 12] (reproduced in Appendix A of Appellant's Opening Brief), and the Supreme Court has said that "the moving party should not be deprived of the arbitrator's

The logical extension of the Employer's argument in this case in support of the District Court's decision, is that if the Union *must* assert as a counterclaim even arbitrable grievances, a party to a contract calling for arbitration who would rather litigate than arbitrate need only file a suit contesting the arbitrability of the particular dispute or the applicability of the contract.[2] The other party would then be forced to the election of either asserting as a counterclaim all pending grievances which involved an interpretation of the contract, or run the risk of waiving those grievances under Rule 13(a).

We need go no further than the recent decision of this Court in *Los Angeles Paper Bag Co. v. Printing Specialties Union,* 345 F.2d 757 (9th Cir. 1965) for an excellent illustration of the ludicrous result the Employer's theory would have.

In *Los Angeles Paper Bag,* a suit was brought by a union to compel arbitration over the discharge of some employees for allegedly engaging in a strike. The employer counterclaimed for damages as a result of the alleged strike. With this Court's approval, the District Court ordered arbitration of the grievances to determine whether in fact there had been a strike, in the face of a contract clause expressly excluding from arbitration discipline imposed by the employer on persons who participate in strikes or work stoppages. In addition, the em-

---

judgment, when it was his judgment and all that it connotes that was bargained for," *United Steelworkers v. American Mfg. Co.,* 363 U.S. at 568, 4 L.Ed.2d at 1407.

[2]Such a question, *i.e.*, arbitrability or applicability of the contract, must be answered by a court, see *John Wiley & Sons v. Livingston,* 376 U.S. 543, 546-47, 11 L.Ed.2d 898, 902-03 (1964), in the absence of a provision to the contrary, see *Desert Coca Cola Bottling Co. v. General Sales Drivers,* 335 F.2d 198, 199 (9th Cir. 1964).

ployer's counterclaim was stayed until the arbitrator decided if a strike had occurred.

Under the reasoning of the Employer in the instant case, the result in *Los Angeles Paper Bag* depended upon the fortuitous circumstances of whether the employer or the union initiated the court action, for if the employer had first sued for strike damages, the union would have been required to assert as a compulsory counterclaim for court adjudication its grievances over the employees' discharge.[3]

The District Court's ruling would turn *Los Angeles Paper Bag* on its head. Instead of giving way to the arbitral process, the District Court and the Employer would hypertechnically apply Rule 13(a) so as to erase a party's right to arbitrate whenever his opponent was so minded as to file a lawsuit—no mater how spurious—which was based on the same contract as that upon which the grievances were based.

The absurdity of such an emasculation of our National policy is patent and is answer enough to the Employer's arguments.

Respectfully submitted.

BRUNDAGE & HACKLER.
ALBERT BRUNDAGE.
JULIUS REICH.
Attorneys for Appellant.

---

[3]The agreement in *Los Angeles Paper Bag* did not require the employer to arbitrate its claim for damages, 345 F.2d at 760; *compare Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238, 241, 8 L.Ed.2d 462-66 (1962), *with Drake Bakeries, Inc. v. Local 50, American Bakery Workers Union*, 370 U.S. 254, 258, 8 L.Ed.2d 474, 477-78 (1962). The same situation is applicable in the present case, where the Employer's suit against the Union was a non-arbitrable suit under section 302 of the LMRA [29 U.S.C. § 187].

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JULIUS REICH